

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-210010.2

DATE: June 26, 1984

MATTER OF: Video Visions, Inc.

DIGEST:

1. Protest against agency's determination to retain function in-house based on Office of Management and Budget Circular A-76 cost comparison is denied where errors made by agency in computing its in-house cost estimate do not change the evaluation result.
2. Comparison of costs of contracting out or retaining function in-house must be based upon direct labor rates anticipated for federal employees during first year of performance period rather than federal pay rates effective during the earlier period of applicable wage determination.
3. Ordinarily, where the solicitation fails to indicate specific standards to be used in conducting a cost comparison under Office of Management and Budget Circular A-76, offerors may assume that the procuring agency will apply the published procedures in effect at the time, not those previously effective. However, where the application of the standards in effect at time would have resulted in an erroneous cost comparison, GAO will not object to the agency's use of the prior standards.
4. Protest not filed within 10 working days of when protester knew of basis of protest or, alternatively, not filed within 10 working days of agency's initial adverse action on protest, is untimely. Contention that protester did not have sufficient information to constitute basis for protest against alleged conflict of interest until results of evaluation were known is inconsistent with protester's

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assertion that it knew of and protested alleged conflict during the course of the procurement.

Video Visions, Inc. protests that the Headquarters, U.S. Army Quartermaster Center and Fort Lee, Virginia, violated established procedures for evaluating bids to furnish audiovisual services at that installation. Fort Lee solicited offers under request for proposals No. DABT-59-82-R-0049 for the purpose of determining whether to perform the work in-house or by contract. Based on a comparison of its estimate of in-house performance with Video Vision's low offer (the only one submitted), Fort Lee determined it would be less costly to continue performing audiovisual services in-house. We deny the protest in part and dismiss it in part.

Background

Generally, we do not review an agency decision to perform work with its own employees rather than to contract for the services because we regard the decision as a matter of policy within the province of the executive branch. Crown Laundry and Dry Cleaners, Inc., B-194505, July 18, 1979, 79-2 CPD ¶ 38. Where, however, an agency uses the procurement system to aid in its decision-making, spelling out in the solicitation the circumstances under which it will award or not award the contract, we will review the matter to determine whether the procedures identified in or applicable to the solicitation were followed, particularly in comparing in-house and contract costs. Holmes & Narver Services, Inc. et al., B-212191, Nov. 17, 1983, 83-2 CPD ¶ 585, modified, B-212191.2, April 17, 1984, 84-1 CPD ¶ 425. However, the burden is on the protester to show the inaccuracy of the cost comparison. Ampex Systems, Inc., B-195684, Nov. 29, 1979, 79-2 CPD ¶ 379.

Fort Lee, on May 5, 1982, solicited proposals for a 1-year base period and four 1-year option periods. Video Visions' final offer for the 5-year period was \$11,263,615. Fort Lee then conducted a cost comparison analysis under the guidance of the Office of Management and Budget (OMB) Circular A-76 and concluded that contracting with Video Visions for the 5-year period would cost \$21,721,255, while performing the services in-house would cost the government a total of \$21,351,817, or \$369,438 less.

Video Visions filed a timely appeal with the Army, challenging some 12 aspects of Fort Lee's cost comparison.

When the Army affirmed Fort Lee's decision to retain the audiovisual services in-house, Video Visions protested to this Office. Video Visions questions Fort Lee's assessment of underutilized government overhead against the cost of contracting out; the number of government employees retained if the work is converted to contract; and the period used for comparing labor rates. Video Visions also contends that Fort Lee improperly mandated an increase in Video Visions' staffing during discussions and that certain of Fort Lee's employees involved in the evaluation had conflicts of interest.

Video Visions argues that whatever may have been the case previously, Fort Lee's method of evaluation was erroneous because it did not comply with Transmittal Memorandum No. 6 (TM-6), amending OMP Circular A-76, published in the Federal Register (47 Fed. Reg. 4629, 4630) on February 1, 1982. Among other things, TM-6 changed the way underutilized government overhead was to be evaluated. Video Visions points out that TM-6 was effective upon issuance and asserts that the Army was obligated to follow it. Moreover, the protester asserts that even if the policies set forth in TM-6 required the development of alternative cost procedures, the change made by TM-6 regarding underutilized overhead was self-executing and did not require additional implementing instructions. Consequently, according to Video Visions, Fort Lee should not have taken into account the cost attributable to underutilized personnel overhead at Fort Lee in estimating the cost of contractor performance because TM-6 specifically prohibited that action.

The Army states that it was not required to follow TM-6 because both the Department of Defense and the Army had issued explicit directions not to follow TM-6 until such time as new costing procedures were approved, which did not occur until after Fort Lee had commenced its audit of the cost comparison here in question.

As stated above, our concern in reviewing these cost comparison cases is to see that the cost comparison and other procedures identified in or applicable to the solicitation are followed. With respect to the cost comparison procedures, we look to see that the comparison made is not faulty or misleading. Holmes & Narver Services, Inc. et al., B-212191, supra. The solicitation in this case did not specify any particular cost comparison procedures that would be used, although, since these comparisons are conducted by

executive agencies pursuant to OMB Circular A-76, we think it is reasonable for offerors to have assumed that the procedures mandated by the Circular would be followed. We have previously recognized, however, that with regard to underutilized overhead, the TM-6 evaluation approach (which is no longer in effect) would have resulted in an erroneous cost comparison, and that therefore the Army could properly use its own evaluation method to avoid such a result. See Holmes & Narver Services, Inc. et al., B-212191.2, supra. Consequently, while we think it would have been appropriate for Fort Lee to indicate in the solicitation that TM-6 would not be followed, see Day & Zimmerman, Inc., B-212017, April 3, 1984, 84-1 CPD ¶ 377, we will not object to the Army's use here of its own pre-existing procedures.

We also note that the Army, after this protest was filed, recalculated the cost comparison using the procedures that it adopted subsequent to issuance of TM-6. The Army reports that even under those procedures, in-house performance was evaluated as \$313,361 less expensive than contracting out.

Video Visions complains that this recalculation failed to take into account personnel-related overhead costs in lines 3, 4, 5, 7 and 8 of the cost comparison form. Video Visions fails to recognize, however, that both the title to and instructions for lines 3 and 4 are limited to direct labor; that line 5 is the personnel-related overhead chargeable to in-house performance under these procurements; and that line 8, a simple multiplication by set factors to account for inflation, is correct if the underlying numbers are correct. Line 7, general and administrative expenses, is separately calculated and is not affected one way or the other by the estimated cost of personnel-related overhead. We do not believe, therefore, that the protester has shown the recalculation to be inaccurate.

Comparison of Direct Labor Costs

Video Visions contends that Fort Lee erred in a number of respects when calculating the direct labor costs for performing the work in-house.

The solicitation contemplated that performance would commence on October 1, 1982 and that the initial contract year would extend through September 30, 1983. However, consistent with Comptroller of the Army Letter No. 82-4 dated February 28, 1982, Fort Lee calculated the salaries of federal workers for the same period as the most recent

applicable Department of Labor Wage Determination, which covered the period December 1, 1981 through November 30, 1982.

Video Visions contends that conforming the federal wages in this manner to the period covered by the Wage Determination was improper because it failed to reflect the higher wage rates that would be paid to the federal workers during the latter portion of the first contract year due to an anticipated raise. Moreover, in Video Visions' opinion, Fort Lee's failure to use the actual rates for the first year of the contract violated the requirement set forth on page 7 of Appendix 4 of the DOD Cost Comparison Handbook, that the "cost comparison period shall match the period of the proposed contract."

We agree. Although it appears that the Army intended that the approach used here would provide a more equitable cost comparison of in-house versus contract performance, see Joule Maintenance Corporation, B-208684, Sept. 16, 1983, 83-2 CPD ¶ 333, the application of the approach under the circumstance of this case distorts the in-house estimate because the direct labor estimate is based on wages that do not reflect those anticipated during the latter portion of the first year of contract performance. Holmes & Narver Services, Inc. et al., B-212191, supra. We believe that Fort Lee was required to estimate the cost of in-house direct labor for the first year of contract performance, and to include in that estimate any upward adjustment in federal wages anticipated during that period. Id.

According to Video Visions, this error accounts for an underestimate in the government's cost of approximately \$300,000. This, of course is less than the original cost savings calculated as well as the \$313,361 cost savings calculated under the new procedures.

Video Visions also states that wages for government employees in service positions should be inflated over the full 5-year period of anticipated contract performance. However, there is clear guidance to the contrary in the relevant DOD instructions and the protester's position is clearly at odds with the requirement that the cost comparison be conducted in an evenhanded manner as possible. Since the DOD cost comparison procedures do not inflate the counterpart wages of contractor personnel working in service positions over the duration of the contract, we cannot agree that wages

for federal employees should be inflated. See Technicolor Government Services, Inc., B-209577.2, Sept. 21, 1983, 83-2 CPD ¶ 353.

Retention costs

Video Visions first questions an unexplained substantial increase in the Army's estimate of the cost of "save pay" protection for those federal employees transferred to lower paying jobs as a result of contracting out. This increase in pay retention costs, according to Video Visions, occurred after the submission of its final offer, so that the Army estimate is therefore "of suspicious accuracy at best."

The record shows that the Army auditors substantially increased Fort Lee's estimate of retained pay because Fort Lee's initial calculation was based on the assumption that only 16 employees, the difference between its current work force and its proposed staffing level of 73, would have their jobs eliminated if the work were turned over to a contractor. The record further shows that this audit was completed July 26, which is before the August 6 date Video Visions' initial proposal was received. We therefore cannot agree that the derivation of the estimate is somehow suspect.

Video Visions also questions the auditors' estimate of retained pay that the government would be required to pay in the event of conversion from in-house to contract performance. Video Visions contends that the assumption that every government employee would remain with the government and that none would accept unemployment with Video Visions is untenable. Video Visions argues that in other such conversions the majority of the federal workers involved accepted employment with the contractor.

As to the reasonableness of the estimate, Fort Lee argues that due to the small number of employees in the audiovisual unit, as compared to the total number of federal employees at Fort Lee, all would be offered positions at retained pay at Fort Lee. Fort Lee believes that its ability to place these workers at retained pay for 2 years eliminates whatever incentive that they might otherwise have to retire or to work for a contractor.

The Cost Comparison Handbook requires the contracting agency to estimate any additional direct labor costs that the government will incur as a result of contracting out--for example, severance pay, retraining, and pay rate retention--and include them in the one-time costs assessed against the

contractor in line 25 of the cost comparison form. In our view, estimates of this kind involve complex and somewhat subjective judgments, which we are not in a position to second guess. Facilities Engineering & Maintenance Corporation, B-210376, Sept. 27, 1983, 83-2 CPD ¶ 381. Mere disagreement with the Army's judgment simply does not meet the protester's burden to prove its case. See MAR, Incorporated, B-205635, Sept. 27, 1982, 82-2 CPD ¶ 278.

We agree with the Army that estimates of probable retention rates should take into account the particular circumstances of the work being competed, including the prospects for continued federal employment at retained pay in that immediate area or, as here, the same installation. See Facilities Engineering & Maintenance Corporation, *supra*. While it is clear that Video Visions disagrees with Fort Lee's judgment that Fort Lee's employees would prefer continued federal employment over working for the contractor if jobs with retained pay status are available at that installation, it has not shown why this conclusion is unwarranted. Again, we point out that we are constrained to recognize a degree of agency discretion in making judgments such as these; we do not believe that Video Visions' disagreement with Fort Lee's assumed retention rate for federal employees shows that Fort Lee's exercise of discretion was unreasonable.

Other Issues

Video Visions also asserts that two of Fort Lee's technical evaluators had conflicts of interest, one because his work at Fort Lee involved continuous use of graphics produced by Fort Lee's Training and Audiovisual Support Center (TASC), the activity being considered for contracting out, and because his wife worked for TASC, the other because he was employed at and supervised photographic services for TASC.

As to the first individual, Fort Lee reports that although his wife had worked at TASC at one time, she was no longer employed there when Video Visions' proposal was evaluated. Further, Fort Lee does not believe that a conflict of interest is created simply because an evaluator has routine dealings with the organization subject to contracting out review. We agree. The protester has neither explained why Fort Lee's use of evaluators who have dealt with the organization under review creates a conflict nor cited any support for that proposition.

As to the second individual, Video Visions asserts that this person had a clear conflict of interest because his job was in jeopardy and that this conflict was translated into actual prejudice because Fort Lee insisted that Video Visions increase its photographic staff during negotiations, which is the very area this individual evaluated.

Fort Lee replies that it was forced to use a TASC employee to evaluate proposals because, despite a diligent search, it could not locate any other personnel with suitable knowledge of Fort Lee's photographic requirements. Fort Lee contends that his role deliberately was limited and did not prejudice Video Visions, as evidenced by Video Visions' final proposal, which offered one-half year more photographic staffing than Fort Lee's negotiator recommended. Moreover, Fort Lee contends that Video Visions knew of this individual's role in the evaluation process by the time the site inspection was conducted, when he was introduced and his participation in the evaluation explained. Consequently, Fort Lee argues, Video Visions' objections to his participation, first raised when the cost comparison was completed, are untimely.

Video Visions denies that its allegation of conflict is untimely, stating that it immediately objected to this individual's participation in the evaluation and, to that end, Video Visions has furnished an affidavit from its employee which states that she protested both during the site inspection and subsequently during numerous telephone conversations. Alternatively, Video Visions argues that it had no duty to protest until the cost comparison process was completed and the results known, because it did not know for certain that it had been prejudiced until that time.

If we accept Video Visions' argument that its employee vigorously protested to Fort Lee on September 13 during the site visit, then Fort Lee's refusal to take corrective action by the September 25 filing date for receipt of final proposals constituted an adverse action. Tracor Jitco Inc., B-208476, Jan. 31, 1983, 83-1 CPD ¶ 98. Video Visions' protest, filed more than 10 days later on November 26, was therefore untimely. 4 C.F.R. § 21.2(a) (1984). Alternatively, if Video Visions' conversations with Fort Lee personnel did not amount to a protest even though it was admittedly aware of the alleged conflict of interest by the time of the site visit, Video Visions failed to protest within 10 working days of when it knew of the basis of protest and its protest filed after that period is untimely. 4 C.F.R. § 21.2(b)(2). As to Video Visions' third alterna-

tive contention, that it did not have sufficient information to protest until the cost comparison was made public, we attach little credence to this possibility because Video Visions' affidavit directly contradicts this position. As noted in this affidavit, Video Visions' employee states that she was aware of and repeatedly protested Fort Lee's use of this evaluator, so Video Visions cannot now be heard to say that it was not aware of any basis for protest before the cost comparison was complete. Consequently, we view this allegation of conflict of interest as untimely.

We note, however, that the evaluator's role was limited and actual prejudice was unlikely because contract negotiations on the photographic function resulted in a net decrease of \$101,330 in Video Visions' proposed cost. In this respect, although Video Visions proposed a 2-1/2 staff-year increase in response to the Army's recommendation for a staff-year increase of 2, the Army also agreed that Video Visions' proposed overtime costs could be deleted as a result of this staff increase, thereby reducing the firm's overall costs in this area. In our opinion, contract negotiations that result in an overall reduction in contractor costs in a situation such as this cannot be considered prejudicial.

Video Visions also contends that Fort Lee, rather than simply pointing out perceived deficiencies in its proposed staffing levels, improperly mandated required staffing levels during discussions which were in excess of that actually needed to perform the work. While we see no impropriety with procuring agencies providing explicit guidance on desired staffing levels during discussions, Deciloq, Inc., April 5, 1983, 83-1 CPD ¶ 356, this aspect of Video Visions' protest is untimely because it was not part of its initial protest and our procedures do not contemplate a piecemeal presentation or development of protest issues. Blue Cross-Blue Shield of Tennessee, B-210227, May 23, 1983, 83-1 CPD ¶ 555.

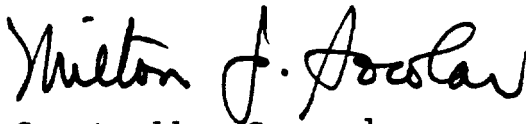
Finally, Video Visions contends that even if these conflict and procedural issues relating to staffing levels were not timely protested, they should be considered because the protest raises issues significant to procurement practices and procedures. While our Bid Protest Procedures provide an exception to the timeliness requirements where the protest raises "significant issues," see 4 C.F.R. § 21.2(c), this exception requires that the issue be one of widespread interest to the procurement community not previously considered. Sequoia Pacific Corporation, B-199583, Jan. 7, 1981, 81-1 CPD ¶ 13. In order to prevent the timeliness

requirements from becoming meaningless, this exception is strictly construed and seldom used. Ensign Aircraft Company, B-207898.3, April 1, 1983, 83-1 CPD ¶ 340. The issues here do not present unique issues of first impression. Neither are they of widespread interest. The Army explains that Fort Lee used the TASC employee as an evaluator only because no other suitable personnel were available and that the Army has now issued a directive advising its procurement personnel to avoid using evaluators employed by the activity subject to review even in those circumstances. Therefore, we do not view the matter as one of broad interest to the procurement community.

Conclusion

The only error in Fort Lee's cost estimating, the period used for determining labor rates, does not affect the validity of the cost comparison because in-house performance remains lower than contracting out. Correction of this error would therefore not change the evaluation result. See Dyneteria, Inc., B-205487, June 1, 1982, 82-1 CPD ¶ 506.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States